

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 02-55795 JRG
3DFX INTERACTIVE, INC., Chapter 11
Debtor.
_____/

WILLIAM A. BRANDT, JR., TRUSTEE, Adversary No. 03-5079
Plaintiff,
vs.
NVIDIA CORPORATION, a Delaware
corporation; et al.,
Defendants.
_____/

ORDER

I. INTRODUCTION

Before the court is the issue of defendants', Nvidia Corporation and Nvidia US Investment Company, Inc. (referred to collectively as Nvidia), right to a jury trial in the adversary proceeding brought by the Chapter 11 Trustee, William Brandt. The court heard oral arguments on the issue and allowed supplemental briefing. After

1 considering the issue of Nvidia's right to a jury trial, the court
2 concludes that Nvidia waived any right it had to a jury trial by
3 failing to make a timely demand.

4 **II. BACKGROUND**

5 The debtor, 3dfx Interactive Inc., filed bankruptcy on October
6 15, 2002. Nvidia is involved in litigation stemming from its purchase
7 of the assets of the debtor in 2001. Two former landlords of the
8 debtor brought suit against Nvidia alleging theories of successor
9 liability, tortious interference with contract, conspiracy, and other
10 tort-related theories.

11 The landlord actions were pending adversary proceedings in the
12 bankruptcy court. However, on May 9, 2005, the reference was withdrawn
13 and the landlord actions are now pending in the district court. The
14 parties are in agreement that Nvidia is entitled to a jury trial in
15 the landlord actions.

16 As part of the debtor's bankruptcy proceeding, on February 18,
17 2003, Nvidia Corporation filed a proof of claim in the amount of
18 \$20,046,764.15, for setoff and/or recoupment rights. Nvidia alleged
19 that it holds various claims against the debtor as a result of the
20 debtor's acts and omissions relating to the asset purchase agreement.
21 In addition, Nvidia sought indemnity related to the lawsuits filed by
22 the debtor's landlords.

23 The court appointed a Chapter 11 Trustee in the debtor's
24 bankruptcy in January 2003. On February 24, 2003, the Trustee filed
25 an adversary proceeding against Nvidia. The Trustee asserts two
26 theories of recovery: (1) fraudulent conveyance; and (2) defacto
27 merger. The Trustee's lawsuit stems from the same transaction,
28 Nvidia's purchase of the debtor's assets in 2001.

1 Prior to the reference on the landlords' adversary proceedings
2 being withdrawn, Nvidia filed a motion to have the landlords' and the
3 trustee's adversary proceedings consolidated into a single proceeding.
4 This court allowed consolidation for discovery purposes only. On the
5 issue of consolidation for trial, this court has preliminarily
6 concluded the motion was premature given the posture of the cases.

7 Nvidia concedes that it failed to make a timely demand for a jury
8 trial in the Trustee's adversary proceeding as required by Federal
9 Rule of Civil Procedure 38. However, Nvidia argues that its right to
10 a jury trial has not been waived and that the court must grant its
11 request for a jury trial because to do otherwise would infringe upon
12 its constitutional right to have the issues decided by a jury.

13 The Trustee argues that Nvidia does not have any right to a jury
14 trial in the Trustee's action. Nvidia waived its right by failing to
15 file and serve a timely jury demand. In addition, the Trustee argues
16 that by filing its proof of claim, Nvidia submitted itself to the
17 jurisdiction of the bankruptcy court, waiving its right to a jury
18 trial.

19 **III. DISCUSSION**

20 In any proceeding in which a demand for jury trial is made, the
21 bankruptcy court shall determine whether the demand was timely made
22 and whether the demanding party has a right to a jury trial.
23 Bankruptcy Local Rule 9015-2(a).¹ Under Bankruptcy Local Rules 9015-1

24
25 ¹ Bankruptcy Local Rule 9015-2(a) provides:

26 (a) **Determination of Right.** In any proceeding in which a demand for jury trial is
27 made, the Bankruptcy Judge shall, upon the motion of one of the parties, or upon
28 the Bankruptcy Judge's own motion, determine whether the demand was timely made
and whether the demanding party has a right to a jury trial. The Bankruptcy Judge
may, on the Judge's own motion, determine that there is no right to a jury trial

1 and 9015-2(e), Federal Rules 38(a)-(d) and 39 govern the demand for
2 a jury trial.²

3 At issue is whether Nvidia's failure to serve and file a demand
4 for a jury trial as required by Rule 38(b), constitutes a waiver by
5 Nvidia of a trial by jury.³ Nvidia argues that the court may, in its
6 discretion, allow their jury trial request to be granted under Rule
7 39(b).⁴

8 As the court discussed at the hearing on this issue, the
9 discretion of the court to order a jury trial on a motion by a party
10 who has not filed a timely demand is a narrow one. Pacific Fisheries

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in a proceeding even if all of the parties have consented to a jury trial.

14 ² Bankruptcy Local Rule 9015-1 provides, "FRCivP 38(a)-(d) applies in adversary
15 proceedings." Bankruptcy Local Rule 9015-2(e) provides, "In any proceeding within
16 the jurisdiction created by 28 U.S.C. § 1334, FRCivP 38(a)-(d), 39, 47-51, and 81(c) shall
17 govern the demand for and conduct of jury trials."

18 ³ Federal Rule of Civil Procedure 38 (b) and (d) provide:

19 (b) **Demand.** Any party may demand a trial by jury of any issue triable of right by
20 a jury by (1) serving upon the other parties a demand therefor in writing at
21 any time after the commencement of the action and not later than 10 days after
22 the service of the last pleading directed to such issue, and (2) filing the
23 demand as required by Rule 5(d). Such demand may be indorsed upon a pleading
24 of the party.

25 (d) **Waiver.** The failure of a party to serve and file a demand as required by this
26 rule constitutes a waiver by the party of trial by jury. A demand for trial by
27 jury made as herein provided may not be withdrawn without the consent of the
28 parties.

⁴ Federal Rule of Civil Procedure 39(b) provides:

(b) **By the Court.** Issues not demanded for trial by jury as provided in Rule 38
shall be tried by the court; but, notwithstanding the failure of a party to
demand a jury in an action in which such a demand might have been made of
right, the court in its discretion upon motion may order a trial by a jury of
any or all issues.

1 Corp. v. HIH Cas. & Gen. Ins. Ltd., 239 F.3d 1000, 1002 (9th Cir.
2 2001). The court's discretion does not permit it to grant relief when
3 the failure to make a timely demand is the result of an oversight or
4 inadvertence. Id.

5 In its supplemental briefing, Nvidia seeks to rely on the
6 statement in Pacific Fisheries Corporation, 239 F.3d at 1002, that
7 "[a]n untimely request for a jury trial must be denied unless some
8 cause beyond mere inadvertence is shown." According to Nvidia,
9 "cause" to grant a jury trial exists due to the overlap in the
10 landlords' and the trustee's actions, which overlap is so significant
11 that a jury trial must be granted to avoid trampling on Nvidia's
12 constitutional right to a jury trial in the landlords' cases. Nvidia
13 asserts that where jury and non-jury claims are closely related
14 factually, it is appropriate to try all facts to a jury. In addition,
15 according to Nvidia, a right to a jury trial can be foreclosed by a
16 prior non-jury determination only in the "most imperative
17 circumstances, circumstances which in view of the flexible procedures
18 of the Federal Rules we cannot now anticipate." Beacon Theatres, Inc.
19 v. Westover, 359 U.S. 500, 510-11 (1959); Dairy Queen, Inc. v. Wood,
20 369 U.S. 469, 473 (1962); Ross v. Bernhard, 396 U.S. 531, 538 (1970).

21 However, in reviewing Nvidia's supplemental brief, the court
22 concludes that Nvidia is once again arguing for consolidation couched
23 in terms of the court's discretion under Rule 39(b). Nvidia asks the
24 court to excuse its failure to request a jury trial by arguing
25 "constitutional imperatives." However, the constitutional issues
26 Nvidia raises do not explain Nvidia's failure to request a jury trial
27 timely.

28 A case cited by Nvidia in support of its position, Cedars-Sinai

1 Med. Ctr. v. Revlon, Inc., 111 F.R.D. 24, 29-31 (D. Del. 1986),
2 actually comes to the conclusion that the constitutional issue is not
3 a sufficient reason for the court to exercise its discretion under
4 Rule 39(b). In Cedars-Sinai, the court was faced with the issue of
5 whether to grant the plaintiff's untimely request for a jury trial
6 under Rule 39(b) after the plaintiff failed to make a timely demand
7 in its initial lawsuit. The plaintiff brought a second suit against
8 the same defendants on related claims and reserved its right to a jury
9 trial in the second suit. The plaintiff then argued that it was
10 entitled to a jury trial on all issues including those raised in the
11 first lawsuit because it would avoid duplicative trials if all issues
12 could be decided in a single trial.

13 The district court concluded that the plaintiff had ample time
14 to raise a demand for a jury trial. The court was reluctant to
15 exercise its discretion to grant a jury trial on any of the issues in
16 the first case because the plaintiff had "neglected to take advantage
17 of the clear mandates of the Federal Rules in demanding a jury trial."
18 Id. at 31.⁵

19 This decision is consistent with the Ninth Circuit's conclusion
20 that Rule 39(b) does not permit relief where the waiver was caused by
21 oversight or inadvertence. Pacific Fisheries Corp., 239 F.3d at 1002.

22
23 ⁵ Noteworthy in Cedars-Sinai, is the fact that the court refused to exercise its
24 discretion under Rule 39(b). It found the issue of whether the plaintiff's Seventh Amendment
25 right was at risk was an appropriate question for consolidation. The court did conclude that
26 consolidation was warranted because of the direct conflict with the plaintiff's Seventh
Amendment right to a jury trial that separate jury and non-jury trials would create. Thus,
the court determined that the two cases should be consolidated and that the plaintiff should
be granted a joint jury trial in both cases. Id. at 32.

27 This court does not issue any opinion on the consolidation issue and its affect on
28 Nvidia's right to a jury trial in the Trustee's action. The court has concluded that the
consolidation issue is premature at this time and only considers the question before it to
be whether it should exercise its discretion under Rule 39(b).

1 Nvidia's failure to request a jury trial has not been demonstrated to
2 be anything beyond inadvertence or oversight. Nvidia seeks to rely
3 on another concept, namely consolidation, to circumvent the
4 prohibition on granting untimely jury demands due to inadvertence.
5 This is not a sufficient basis under Rule 39(b) for the court to
6 exercise its discretion, because the Ninth Circuit has concluded that
7 the court is not permitted under Rule 39(b) to excuse an inadvertent
8 failure to request a jury trial. Russ v. Standard Ins. Co., 120 F.3d
9 988, 989-90 (9th Cir. 1997).

10 The other issue raised by the Trustee is that Nvidia has waived
11 its right to a jury trial by filing a proof of claim in the 3dfx
12 bankruptcy. The Trustee argues that the law is clear that once a
13 party presents a claim to the bankruptcy court, it subjects itself to
14 all of the consequences that attach to that appearance, including the
15 bankruptcy court's power. Granfinanciera S.A. v. Nordberg, 492 U.S.
16 33, 59 n.14 (1989).

17 The Supreme Court stated: "In Granfinanciera we recognize that
18 by filing a claim against a bankruptcy estate the creditor triggers
19 the process of 'allowance and disallowance of claims' thereby
20 subjecting himself to the bankruptcy court's equitable power."
21 Langenkamp v. Culp, 498 U.S. 42, 44 (1990). However, the court need
22 not decide the affect of the filing of the proof of claim on Nvidia's
23 right to a jury trial. Even if the filing of the proof of claim did
24 not amount to a waiver of Nvidia's right to a jury trial, Nvidia is
25 unable to demonstrate that it meets the requirements of Rules 38 and
26 39 by making a timely demand for a jury trial.

27 IV. CONCLUSION

28 For the reasons herein stated, the court concludes that Nvidia

UNITED STATES BANKRUPTCY COURT

For The Northern District Of California

1 waived its right to a jury trial in the Trustee's adversary proceeding
2 by failing to make a timely demand.

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4 DATED: _____

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7 JAMES R. GRUBE
8 UNITED STATES BANKRUPTCY JUDGE
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1 Adversary No. 03-5079

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5 UNITED STATES BANKRUPTCY COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA

7 CERTIFICATE OF SERVICE - page 1

8 I, the undersigned, a regularly appointed and qualified Judicial Assistant in the office of the
9 Bankruptcy Judges of the United States Bankruptcy Court for the Northern District of California, San
Jose, California hereby certify:

10 That I am familiar with the method by which items to be dispatched in official mail from the
11 Clerk's Office of the United States Bankruptcy Court in San Jose, California processed on a daily basis:
12 all such items are placed in a designated bin in the Clerk's office in a sealed envelope bearing the
address of the addressee, from which they are collected at least daily, franked, and deposited in the
United States Mail, postage pre-paid, by the staff of the Clerk's Office of the Court;

13 That, in the performance of my duties, on the date set forth below, I served the **ORDER** in the
14 above case on each party listed below on the next page by depositing a copy of that document in a sealed
envelope, addressed as set forth, in the designated collection bin for franking, and mailing.

15 I declare under penalty of perjury under the laws of the United States of America that the
16 foregoing is true and correct.

17 Executed on _____ at San Jose, California.

18
19 LISA OLSEN

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1 Adversary No. 03-5079

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5 UNITED STATES BANKRUPTCY COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7 CERTIFICATE OF SERVICE - page 2
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